

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRAD HORACE BEAN,

Defendant-Appellant.

UNPUBLISHED

March 13, 2008

No. 271585

Livingston Circuit Court

LC No. 05-015359-FC

Before: Schuette, P.J., and Borrello and Gleicher, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of armed robbery, MCL 750.529. The trial court sentenced defendant as a second habitual offender, MCL 769.10, to five to 30 years' imprisonment. We affirm. We decide this appeal without oral argument under MCR 7.214(E).

Defendant's conviction arises from the robbery of a Sunoco gas station during the early morning hours of July 30, 2005. The midnight clerk, Alex Forbes, testified that while stocking a walk-in cooler at approximately 3:30 a.m., he noticed someone standing in the gas station doorway. Forbes assumed the person was a customer, and turned to offer assistance. He then noticed that a bandana covered the person's nose and mouth, and realized that he was probably going to be robbed. The person stated, "[A]ll I want is the money." Forbes approached the cash register and opened it. He recalled that the robber kept his hands in his coat pockets, and Forbes "saw like a bulge there," which he assumed was a gun. Forbes gave the person the money in the cash register, and the robber instructed him to "get down on the ground." After hearing the robber leave, Forbes called 911.

The prosecutor played the 911 tape for the jury. In it, Forbes reported the robbery, and responded to the operator's question regarding the presence of any weapons by stating, "[H]e said he had a gun." Forbes also described the robber as wearing silver-framed glasses, jeans, a hat, a jacket and a bandana.

A Livingston County Sheriff's deputy stopped defendant's car shortly after the robbery, and arrested defendant and two other occupants of the vehicle. A search of defendant, the vehicle, and the other passengers yielded a nylon skull cap, a jacket, wire-framed glasses, a black "handkerchief," and a collection of one, five, ten and twenty-dollar bills. The search did not yield any weapons.

Defendant first contends that insufficient evidence supported his armed robbery conviction. According to defendant, Forbes's purely subjective belief that defendant possessed a gun did not supply adequate evidence that he committed an armed robbery, because the prosecutor failed to produce any objective evidence that defendant actually had a weapon. We review de novo a claim of insufficient evidence. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). When determining whether sufficient evidence supports a conviction, we construe the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have concluded that the prosecution proved the essential elements of the crime beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). "Circumstantial evidence and reasonable inferences arising therefrom can sufficiently establish the elements of a crime." *People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001).

The elements of armed robbery consist of an assault, combined with a felonious taking of property from the victim's presence by an armed defendant. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). The armed robbery statute, MCL 750.529, provides that the "armed" element of the crime is established if a person possesses either "a dangerous weapon or an article used or fashioned in a manner to lead any person present to reasonably believe the article is a dangerous weapon." Alternatively, § 529 contemplates that a person who "represents orally or otherwise that he or she is in possession of a dangerous weapon, is guilty" of the crime. *Id.* "[A] concealed hand, held in such a manner as to resemble a pistol, may satisfy the 'armed' element of armed robbery." *People v Burden*, 141 Mich App 160, 165; 366 NW2d 23 (1985).

In *People v Taylor*, 245 Mich App 293, 297-298; 628 NW2d 55 (2001), this Court held that a victim's subjective but reasonable belief that a defendant is armed does not suffice to support an armed robbery conviction, unless the prosecution additionally submits "'some objective evidence of existence of a weapon or article' to the finder of fact." (Citation omitted). Circumstantial evidence may adequately prove a feigned weapon. *Id.* at 301-303. For example, a bulge in the defendant's vest, combined with an accomplice's threat that the defendant would shoot or kill the victim if he resisted, provides sufficient "circumstantial evidence that [the] defendant was armed either with a dangerous weapon or an article fashioned to look like one." *People v Jolly*, 442 Mich 458, 470; 502 NW2d 177 (1993); see also *People v Banks*, 454 Mich 469, 475; 563 NW2d 200 (1997) (observing that the factual basis for the defendant's conviction in *Jolly* "constitutes the absolute minimum level of evidence sufficient to support an armed robbery conviction").

On the basis of *Jolly*, we conclude that in the instant case, the prosecution presented sufficient evidence of the "armed" element of armed robbery. Forbes testified to his sighting of a "bulge" in defendant's coat pocket, which he believed to be a gun. The 911 tape included Forbes twice stating that his assailant "said he had a gun." Forbes additionally told the 911 operator that the robber said that "all I want is the money. No one gets hurt. All I want is the money." Reviewing these facts in the light most favorable to the prosecution, we find that sufficient evidence exists to prove that defendant was "armed," according to MCL 750.529.

Defendant next argues that the prosecution failed to prove the assault element of armed robbery because Forbes's fear did not arise from any specific actions of defendant, but rather the presence of the bandana and Forbes's subjective assumption that defendant would "retaliate" if not given the money. The assault element of armed robbery exists when the defendant commits

an unlawful act that places the victim in reasonable apprehension of an immediate battery. *People v McConnell*, 124 Mich App 672, 678; 335 NW2d 226 (1983). Here, the evidence supports Forbes's reasonable belief that defendant possessed a gun and would use it if denied the money from the cash register. The record reflects that defendant deliberately kept at least one hand in his pocket, covered his face with a bandana, warned Forbes that he had a gun, and advised Forbes that no one would get hurt if defendant got the money, all of which placed Forbes in fear of imminent bodily harm. These facts adequately establish the assault element of defendant's armed robbery conviction.

Defendant further asserts that the trial court erred when it sentenced him as a habitual offender because the prosecution did not timely file the habitual offender notice. On September 30, 2005, the prosecution filed a notice of intent to seek an enhanced sentence as a fourth habitual offender, which listed three out-of-state convictions. On December 15, 2005, the prosecution filed an amended notice reducing the habitual level to second, and substituting a different out-of-state conviction for the three previously listed convictions. Defendant maintains that this amended notice was untimely, and that he is entitled to resentencing.

We review de novo whether the prosecution fulfilled the requirements of the habitual offender notice statute, MCL 769.13. *People v Hornsby*, 251 Mich App 462, 469; 650 NW2d 700 (2002). The relevant portion of the statute provides as follows:

In a criminal action, the prosecuting attorney may seek to enhance the sentence of the defendant as provided under section 10, 11, or 12 of this chapter, by filing a written notice of his or her intent to do so within 21 days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived, within 21 days after the filing of the information charging the underlying offense. [MCL 769.13(1).]

In *Hornsby*, *supra*, this Court held that a prosecutor may amend a timely filed sentence enhancement information to correct a technical defect, as long as the amendment does not otherwise increase the potential sentence consequences. *Id.* at 472. In the instant case, as in *Hornsby*, defendant's possible sentencing consequences decreased as a result of the prosecution's amendment of its initial, timely enhancement notice. Defendant is therefore not entitled to resentencing.

Affirmed.

/s/ Bill Schuette
/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher